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No. 86-453

In the Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL F. CARSON AND SUSAN CARSON, PETITIONERS

v.

JOHN R. BLOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred by rejecting their claim that the alleged failure of various present and former officials and employees of the Department of Agriculture to implement a loan deferral program under 7 U.S.C. 1981a violated the Due Process Clause and entitled petitioners to pursue a $6 million damage claim against the officials and employees in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1. Petitioners purchased a farm in 1977 and subsequently obtained loans aggregating $375,000 from the Farmers Home Administration (FmHA). Al-

though petitioners became delinquent on their loans in 1979, they obtained some forbearance and additional loans. Petitioners contend that in 1981 they requested that their loan payments be deferred under 7 U.S.C. 1981a but that the FmHA County Supervisor denied their request. Instead of seeking administrative review, petitioners sought relief under the bankruptcy laws, and the FmHA eventually purchased the farm at auction. Petitioners became tenants of the FmHA on the farm and applied for a new loan to repurchase it in 1982. The county committee denied their loan application and the state director upheld that decision (Pet. App. A1-A2).

2. On March 23, 1983, petitioners sued then-Secretary Block and seven other officials of the Department of Agriculture, in their individual capacities. The complaint sought damages of $6 million on the theory that petitioners were injured by respondents' alleged failure to implement a loan deferral program under 7 U.S.C. 1981a, and by respondents' actions in connection with the sale of petitioners' farm.[1] The respondents moved for summary judgment on the damages claims, on the ground that they were protected by absolute or qualified immunity. The district court denied their motion in a minute order, with no explanation.

On respondents' appeal from that collateral order (see *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982)), the court of appeals reversed (Pet. App. A1-A8). The court noted (Pet. App. A3) that since petitioners do

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[1] The complaint included a second count, not pertinent here, seeking declaratory and injunctive relief against the officials and the FmHA based upon the alleged failure to consider their request for loan deferral under 7 U.S.C. 1981a.

not contend that 7 U.S.C. 1981a establishes a private right of action for damages, the claim is merely that respondents, acting in the course of their official duties, erred in implementing Section 1981a. That is conduct for which respondents cannot be liable in damages (see *Davis* v. *Scherer*, 468 U.S. 183 (1984)). As the court stated (Pet. App. A3): "federal officials have absolute immunity from liability for common law torts committed in the line of duty. See *Butz* v. *Economou*, 438 U.S. 478, 487-495 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896)."

The court also rejected petitioners' assertion that respondents' supposed misinterpretation of Section 1981a violated the Constitution. Petitioners' analysis, the court stated (Pet. App. A5), "obliterates all differences between constitution and laws * * *." Since "[t]he obligation to consider requests for deferral of repayment of loans comes from a statute," the court concluded, "therefore the officials are entitled to absolute immunity" (*id.* at A6).

The court also rejected petitioners' claim that respondents' alleged "failure to implement § 1981a" was a violation of the Due Process Clause of the Fifth Amendment (Pet. App. A7). First, the court concluded that no hearing was required because the agency had originally made a "legislative-type" decision not to implement the statute. Second, it held that even though the statute "affords some process," the Due Process Clause does not itself require the agency to implement the statute. *Id.* at A7, A8.

Finally, the court stated that the Due Process Clause protects only "life, liberty, or property" and Section 1981a does not create a "property" interest under the Fifth Amendment (Pet. App. A8). Rely-

ing upon its earlier decision in *United States* v. *Markgraf*, 736 F.2d 1179, 1185 (1984), cert. dismissed, 469 U.S. 1199 (1985), the court concluded that "no one is entitled to deferral [under Section 1981a]. The appeal is to discretion rather than to rules. The program therefore does not create a 'property' interest" (Pet. App. A8).

3. In this Court, petitioners challenge only the holding of the court of appeals that Section 1981a created no "property" interest (Pet. i). The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

This Court addressed and rejected an almost identical due process claim last Term in *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986). In that case, this Court held that the court of appeals erred in requiring the Secretary of Agriculture to reopen an emergency farm loan program, which had been time-limited by Congress, on the theory that the Secretary had given defective notice of the program to potential recipients. The Court squarely rejected the farmers' claim that they had been denied due process because of allegedly inadequate notice of the loan program. Slip op. 16. First, the Court noted that it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause * * *." *Ibid.* Second, the Court stated that, even if such a right existed, it was satisfied in that case by publication in the Federal Register. *Ibid.*

The decision in *Lyng* v. *Payne* disposes of petitioners' due process claim here. The court below correctly held that the opportunity to apply for loan

deferral does not itself constitute a property interest cognizable under the Due Process Clause. In any event, petitioners, who are charged with knowledge of Section 1981a (*FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947)), concede in this case that they in fact knew of the provision and applied for deferral. See Pet. 4-5; Pet. App. A2. If, in fact, they made such a request, petitioners were in a position to pursue administrative remedies challenging the agency's denial of relief. See *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). That petitioners failed to do.

But even if due process required something more than notice of the opportunity to apply for loan deferral assistance, there would still be no basis for granting the petition. In this $6 million damage claim against federal officials in their individual capacities, it is clear that at a minimum, respondents are protected by qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). This Court recently reiterated that, in a *Bivens* action, an official "is immune unless his actions violated clearly established law." *Mitchell* v. *Forsyth*, slip op. 18. Petitioners cannot meet this standard. Section 1981a is, on its face, a broad grant of discretionary authority ("the Secretary may permit"). Indeed, petitioners' brief in the court of appeals (at 38) conceded "that the various cases specifically holding that 7 U.S.C. § 1981a created a mandatory duty upon the [respondents] were not decided until after the circumstances giving rise to the cause of action in this case." Even then, those cases held only that Congress required consideration of deferral requests as a statutory matter. No court has held that the Constitution requires such consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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